

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Advanced Methods to Target and Eliminate |) | CG Docket No. 17-59 |
| Unlawful Robocalls |) | |

COMMENTS OF COMCAST CORPORATION

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Comcast Corporation (“Comcast”) submits these comments in response to the Second Further Notice of Proposed Rulemaking (“FNPRM”) adopted on March 22, 2018 in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

Comcast strongly supports the proposals in the FNPRM to establish a comprehensive, centralized, Commission-designated database of reassigned telephone numbers, and to encourage use of this resource by adopting a safe harbor from liability under the Telephone Consumer Protection Act (“TCPA”). Comcast supported these proposals when the Commission first raised them in the *Reassigned Numbers NOI* issued last year in this proceeding,² and the record developed in response to that item has confirmed the wisdom of and widespread support for these proposals. As discussed below, such measures would bring substantial and lasting benefits to legitimate businesses and consumers seeking to communicate with one another, and could be

¹ See *Advanced Methods To Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Further Notice of Proposed Rulemaking, FCC 18-31 (rel. Mar. 23, 2018) (“FNPRM”).

² See *Advanced Methods To Target and Eliminate Unlawful Robocalls*, Second Notice of Inquiry, 32 FCC Rcd 6007 (2017) (“*Reassigned Numbers NOI*”).

implemented in a manner that minimizes costs for the voice providers feeding information into the reassigned number resource and for callers seeking to access the resource.

The FNPRM comes at a busy time for the Commission in its ongoing efforts to address the problem of unwanted calls in a manner that protects consumers while ensuring that legitimate businesses can communicate with their customers without exposure to unwarranted liability. Over the past year-and-a-half, the Commission has been pursuing these initiatives commendably on multiple fronts. For example, the Commission has taken concrete action to address fraudulent robocalls that rely on caller ID spoofing to deceive consumers, most notably by adopting an order allowing voice providers to block spoofed calls in certain circumstances.³ The Commission also has opened a separate proceeding on examining and promoting the development of the end-to-end call authentication standard known as SHAKEN/STIR,⁴ and recently received a report from the North American Numbering Council's ("NANC's") Call Authentication Trust Anchor Working Group on the selection of a governance authority for that protocol.⁵ Meanwhile, the D.C. Circuit's recent ruling in *ACA International v. FCC*,⁶ which

³ See *Advanced Methods To Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706 ¶ 1 (2017).

⁴ See generally *Call Authentication Trust Anchor*, Notice of Inquiry, 32 FCC Rcd 5988 (2017).

⁵ See NANC Call Authentication Trust Anchor Working Group, "Report on Selection of Governance Authority and Timely Deployment of SHAKEN/STIR," May 3, 2018, available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0503/DOC-350542A1.pdf; see also Press Release, *Chairman Pai Welcomes Call Authentication Recommendations from the North American Numbering Council*, May 14, 2018, available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0514/DOC-350690A1.pdf (quoting Chairman Pai as noting that "[t]he NANC report represents a substantial step forward in ensuring that calls can be authenticated and verified").

⁶ *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

struck down multiple controversial rulings adopted in the Commission’s *2015 TCPA Order*,⁷ has reinvigorated interest in exploring broader reforms to the Commission’s regulatory regime implementing the TCPA.⁸

Within this crowded field of issues, the Commission’s efforts in this proceeding to address calls to reassigned numbers plainly should remain an area of continuing focus and activity for the agency. Indeed, the *ACA International* decision, which struck down the Commission’s prior treatment of calls to reassigned numbers under the *2015 TCPA Order*, provides powerful confirmation that the Commission should move forward with the FNPRM’s proposals. There, the court noted that the Commission had “read the statute to ‘anticipate[] the caller’s ability to rely on prior express consent,’ which the Commission interpreted ‘to mean reasonable reliance’”—but found that the Commission’s “safe harbor” allowing for only a single call to learn of a wireless number’s reassignment represented an arbitrary and capricious means of effectuating this “reasonable reliance” approach.¹⁰ The court then went out of its way to point to the specific proposals in the *Reassigned Numbers NOI*—including the creation of “a comprehensive repository of information about reassigned wireless numbers” and the adoption of “a safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information”—as “hav[ing] greater potential to give full effect to the

⁷ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“*2015 TCPA Order*”).

⁸ See Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, CG Docket Nos. 18-152, 02-278, DA 18-493 (rel. May 14, 2018) (“*2018 TCPA Reform PN*”).

⁹ *ACA Int’l*, 885 F.3d at 705 (citation omitted).

¹⁰ *Id.* at 708.

Commission's principle of reasonable reliance.”¹¹ The court's clear endorsement of these proposals, which the FNPRM tees up in even greater detail, adds wind to the sails of these efforts in this proceeding.

As discussed below, the Commission has strong policy grounds and clear legal authority to establish a comprehensive database for reassigned numbers. The absence of such a resource today means that a significant volume of calls are inadvertently placed to the wrong consumers—thus hampering efforts by legitimate businesses to deliver beneficial communications that consumers desire in compliance with the TCPA, and frustrating the ability of consumers to continue receiving desired communications. Section 251(e)'s grant of plenary authority over numbering issues to the Commission provides a solid statutory basis for the agency to step in and establish a comprehensive resource for reassigned numbers. And while creating such a resource likely will require imposing mandatory reporting obligations on all voice providers that manage numbering resources, there are several ways in which the Commission can minimize the overall burden on voice providers while still maximizing the benefits of such a resource for legitimate businesses and consumers alike.

Comcast also continues to support the adoption of an appropriately tailored safe harbor from TCPA liability for entities that consult this comprehensive reassigned number database before placing calls or sending texts. One possible approach would be for the Commission to rule that a caller is not liable under the TCPA for a call inadvertently placed to a reassigned telephone number where the caller (1) has previously obtained the necessary consent to call a particular number; and (2) has reasonably determined, based on a query of the Commission's designated database conducted within 31 days before making a call to that number, that the

¹¹ *Id.* at 709.

number has not been reassigned since consent was obtained. Such a safe harbor would strongly incentivize voluntary use of the database by callers—which in turn would enhance the benefits to consumers by driving down the number of misdirected calls and texts. Additionally, the Commission’s legal authority to adopt this safe harbor is firmly grounded in Section 227(b)—as the D.C. Circuit implicitly recognized in *ACA International*.

Importantly, the Commission’s efforts in this proceeding should move forward in parallel with—and not to the exclusion of—the Commission’s broader reform initiatives in this arena, including its reexamination of other issues involving the TCPA (such as the proper construction of the terms “automatic telephone dialing system” and “called party,” and the appropriate treatment of consent revocation) in the wake of *ACA International*.¹² At the same time, nothing about those broader reform initiatives should preclude the completion of this proceeding and the adoption of the FNPRM’s proposals to address the specific issue of calls to reassigned numbers. The voluminous record already developed in response to the *Reassigned Numbers NOI*, and the widespread support for these proposals from a wide array of commenters across multiple industries and even from the D.C. Circuit itself, strongly favor pressing ahead with these proposals even as the Commission considers additional reform efforts in related proceedings.

DISCUSSION

I. THE COMMISSION SHOULD ESTABLISH A CENTRALIZED REASSIGNED NUMBER DATABASE COUPLED WITH A TCPA SAFE HARBOR

A. A Properly Structured Reassigned Number Database Would Bring Substantial Public Interest Benefits at Relatively Low Costs

Comcast has long supported—and continues to support—the Commission’s proposal to establish a centralized and comprehensive resource for tracking telephone number

¹² See *2018 TCPA Reform PN* at 1-4.

reassignments.¹³ The policy justifications for creating such a resource are clear and compelling. In today’s dynamic marketplace for voice services, number reassignments occur constantly. As the FNPRM notes, “[a]pproximately 35 million numbers are disconnected and made available for reassignment to new consumers each year.”¹⁴ However, “[u]pon disconnecting his or her phone number, a consumer may not update all parties who have called him/her in the past, including businesses to which the consumer gave prior express consent to call and other callers from which the consumer expects to receive calls.”¹⁵ This problem is compounded by the fact that there are currently no comprehensive tools available for tracking number reassignments.¹⁶ The FNPRM is correct in observing that, “[w]hile existing tools can help callers identify number reassignments, ‘callers lack guaranteed methods to discover all reassignments’ in a timely manner.”¹⁷ As a result, the reassignment of telephone numbers continues to present substantial and systemic challenges for legitimate businesses and consumers seeking to communicate with one another.

The current status quo leads to a variety of harms. Businesses “wast[e] considerable resources” in seeking to provide consumers with desired communications when they mistakenly place calls and send texts to reassigned numbers.¹⁸ They also face the prospect of significant

¹³ See Comments of Comcast Corp., CG Docket No. 17-59, at 11 (filed Aug. 28, 2017) (“Comcast NOI Comments”); Reply Comments of Comcast Corp., CG Docket No. 17-59, at 1 (filed Sept. 26, 2017) (“Comcast NOI Reply Comments”); Letter of Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, CG Docket No. 17-59, at 1 (filed Mar. 12, 2018).

¹⁴ FNPRM ¶ 3.

¹⁵ *Id.*

¹⁶ See Comcast NOI Comments at 6.

¹⁷ FNPRM ¶ 5 (quoting *2015 TCPA Order* ¶ 85).

¹⁸ *Id.* ¶ 27.

unwarranted liability under the TCPA for such calls.¹⁹ The statute prohibits entities from “mak[ing] any call” using an “automatic telephone dialing system” or an “artificial or prerecorded voice” to a mobile number without “the prior express consent of the called party,”²⁰ and from “initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.”²¹ While the D.C. Circuit recently vacated the *2015 TCPA Order*’s draconian application of these provisions to the calling of reassigned numbers²²—which had imposed strict liability for all calls to reassigned numbers after an illusory one-call “safe harbor”²³—plaintiffs’ class action lawyers likely will continue to try to hold callers liable for inadvertent calls to reassigned numbers, as they sought to do even before the *2015 TCPA Order* was adopted. If courts were to accept such claims, legitimate callers would continue to face the prospect of substantial liability for making calls or sending texts that they believed were pursuant to the recipients’ express consent—with statutory damages of \$500 per call or text, or \$1,500 per call or text if the violations are found to be willful or knowing.²⁴

Consumers, for their part, face not only the annoyance of receiving calls intended for other individuals, but also the prospect of receiving fewer of the communications they desire, particularly as businesses are forced to limit these communications in light of the cost and

¹⁹ *See id.*

²⁰ 47 U.S.C. § 227(b)(1)(A)(iii).

²¹ *Id.* § 227(b)(1)(B).

²² *ACA Int’l*, 885 F.3d at 707.

²³ *2015 TCPA Order* ¶ 72.

²⁴ *See* 47 U.S.C. § 227(b)(3).

liability considerations noted above.²⁵ As Comcast and others have explained, these communications often include important information about the services consumers receive, such as “calls and texts for scheduling cable service appointments, shipment notifications for online purchases, automated news alerts, information about flight delays or cancelations, and myriad other examples.”²⁶

The need for a comprehensive reassigned number database thus remains imperative today—and fortunately, the Commission’s authority to establish such a database is clear. Section 251(e) of the Communications Act of 1934, as amended (the “Act”), grants the Commission “plenary authority ‘over the [North American Numbering Plan] and related telephone numbering issues in the United States.’”²⁷ The Commission has exercised this authority to impose a variety of numbering-related reporting requirements on voice providers that manage numbering resources.²⁸ Requiring such providers to report number reassignment information for the purpose of establishing the proposed database tool would dovetail with these existing obligations adopted under Section 251(e).

In considering how best to structure and operationalize this database, the FNPRM appropriately notes that the Commission should identify and carefully balance the relevant costs and benefits in a manner that maximizes the utility of the database while avoiding undue

²⁵ See FNPRM ¶ 4 (noting that the threat of unwarranted TCPA liability “can have a chilling effect, causing some callers to be overly cautious and stop making wanted, lawful calls out of concern over potential liability for calling a reassigned number”).

²⁶ Comcast NOI Comments at 5.

²⁷ FNPRM ¶ 10 & n.17 (quoting *Local Number Portability Porting Interval and Validation Requirements, IP-Enabled Services, Telephone Number Portability, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking*, 22 FCC Rcd 19531 ¶ 5 (2007)).

²⁸ See, e.g., 47 C.F.R. § 52.15(f) (imposing “mandatory reporting requirements” and “data collection” obligations on providers that “receive[] numbering resources”).

burdens.²⁹ In this vein, Comcast continues to believe that the best approach is to “require service providers to report reassigned number information to a single, FCC-designated database”—the route favored by “[m]ost commenters addressing this issue” in response to the *Reassigned Numbers NOI*.³⁰ As Comcast has explained, such a centralized database could be managed by the Commission itself, by the Federal Trade Commission (“FTC”) (which administers the federal do-not-call database), or by an outside vendor selected through a competitive bidding process, provided that the Commission maintains close oversight and institutes strict price controls to prevent profiteering.³¹ The alternative approaches noted in the FNPRM are substantially less promising from a cost-benefit perspective. As Comcast has explained previously, requiring voice providers to report reassigned number data directly to numerous different data aggregators would impose greater costs and other burdens on voice providers than reporting into a single, centralized database.³² Profit-motivated aggregators may also seek to charge callers high fees for access to that information.³³ Meanwhile, making reporting to aggregators *optional* for voice providers would undermine the Commission’s stated goal of providing a “comprehensive”

²⁹ See, e.g., FNPRM ¶ 7 (noting the need to ensure that establishing a reassigned numbers database is not “too costly as compared to the likely benefit”).

³⁰ *Id.* ¶ 32.

³¹ Comcast NOI Comments at 11. Notably, the Internet Engineering Task Force has established a working group for an initiative called “MODERN” (which stands for “Managing, Ordering, Distributing, Exposing, and Registering telephone Numbers”), with the goal of “defin[ing] a set of Internet-based mechanisms for the purposes of managing the acquisition and resolution of telephone numbers (TNs) in an IP environment.” IETF, “About MODERN,” *available at* <https://datatracker.ietf.org/wg/modern/about/>. The Commission could consider looking to the cooperative, industry-supported MODERN initiative as a possible future vehicle to support any reassigned numbers database.

³² See Comcast NOI Comments at 12.

³³ See *id.*

solution³⁴—as the resulting compliance tools would be no more comprehensive than existing tools in the marketplace, which likewise rely on voluntary reporting and other aggregation methods.

Moreover, the Commission’s interest in establishing a truly comprehensive solution militates strongly in favor of mandating reporting by “all types of voice service providers, including wireless, wireline, interconnected VoIP, and non-interconnected VoIP providers.”³⁵ As the FNPRM notes, “[n]early all” commenters addressing this issue in response to the *Reassigned Numbers NOI* agreed “that an effective reassigned numbers solution must contain data from all service providers,” and “that without data from all voice service providers, a reassigned numbers database ‘would contain insufficient . . . information about a potentially large set of numbers[.]’”³⁶ To be sure, Comcast recognizes that adopting mandatory reporting obligations will impose costs on voice providers—including on Comcast itself, which provides VoIP services to millions of customers throughout its service footprint. But the Commission can and should structure its database in a manner that minimizes these costs without sacrificing the substantial benefits that such a database will bring for businesses and consumers.

³⁴ FNPRM ¶ 2.

³⁵ *Id.* ¶ 19.

³⁶ *Id.* (quoting Comcast NOI Comments at 15, and citing various other commenters). Comcast continues to agree with the observation in the *Reassigned Numbers NOI* that “[s]ome service providers, including many interconnected VoIP providers” and mobile virtual network operators, “do not obtain numbers directly from the numbering administrators, but rather obtain numbers for their residential or business customers from carrier partners”—and thus that “any obligation to report reassignment information for such providers” should “attach to the carriers that provide these number resources.” *Reassigned Numbers NOI* ¶ 13.

Thus, for instance, in determining what types of information should be reported to the database,³⁷ the Commission should adopt an approach that is sufficiently flexible to enable voice providers to rely on existing recordkeeping practices where possible, while also ensuring that the database provides callers with enough information to make reasonable determinations as to whether consent is still valid for a particular number. Both in the *Reassigned Numbers NOI* and in the FNPRM, the Commission has asked whether to require voice providers to track and report when a number has been disconnected, aged out, made available for assignment, or assigned to a new subscriber,³⁸ and Comcast has noted potential advantages and disadvantages posed by each approach.³⁹ Comcast continues to believe that service providers routinely track this kind of information for the numbers they manage—particularly the dates of disconnection and reassignment.⁴⁰ However, to the extent that some providers track and maintain useful information for these purposes in a different way, the reporting requirement adopted in this proceeding should be flexible enough to account for such differences without jeopardizing the usefulness of the database.

One possible solution would be for the Commission to require each voice provider to report, for each telephone number allocated to that voice provider, the date on which the provider's records indicate that the number was most recently disassociated permanently from the number's previous owner—according to whatever method the provider uses to track and record this information. Thus, for instance, where a provider tracks disconnection information and treats disconnected numbers as permanently disassociated from their previous owners, the

³⁷ See FNPRM ¶¶ 14-15.

³⁸ See *Reassigned Numbers NOI* ¶ 11; FNPRM ¶ 14.

³⁹ See Comcast NOI Comments at 16-18.

⁴⁰ See FNPRM ¶ 15 & n.26 (quoting Comcast NOI Reply Comments at 4-5).

provider could report the date of disconnection to the database as the relevant data point.⁴¹

Alternatively, where a provider tracks only when a disconnected number has completed the aging process and is available for assignment to a new customer, and where a provider does not treat a number as permanently disassociated from the prior subscriber until that point, it could furnish the relevant date for that event instead. Either way, the database would end up containing information sufficient for callers to determine whether consent obtained for a particular number remains valid. If, for instance, the database shows that the most recent date on which a particular number was permanently disassociated from its previous owner was January 1, 2018, a caller would know that any consent obtained before that date is invalid, whereas any consent obtained after that date would be valid (if not subsequently revoked). Moreover, under this approach, it likely would be unnecessary for providers *also* to report the subscriber name currently associated with the number; in addition to raising potential privacy concerns, a caller's knowledge of the current account holder's name may not be particularly relevant in determining whether consent remains valid in many instances, as callers often rely on consent provided by someone *other than* the subscriber, consistent with Commission precedent.⁴²

The Commission can address potential cost concerns through other refinements to the reporting requirements as well. For example, while Comcast continues to believe that reporting to the database on a daily basis should not pose significant cost concerns once that process is operationalized and automated,⁴³ a weekly reporting requirement likely would not significantly

⁴¹ See *id.* ¶ 15 (proposing to rely principally on “information about when NANP numbers are disconnected”).

⁴² See *2015 TCPA Order* ¶ 73 (allowing callers to rely on consent provided by “the non-subscriber customary user of a telephone number”).

⁴³ See Comcast NOI Comments at 15.

undermine the usefulness of the database and could appreciably reduce costs for some providers.⁴⁴ The Commission also should take steps to ensure that the format in which information is reported (whether it be in CSV, XML or some other format) is as cost-efficient for voice providers as possible⁴⁵—including by directing any entity that the Commission designates to maintain the database to collaborate with stakeholders on an approach that minimizes the need for voice providers to reformat their own data.

Additionally, Comcast continues to support the establishment of a mechanism whereby voice providers can recoup at least some of the costs associated with mandatory participation, funded by the collection of usage fees from entities accessing the database.⁴⁶ Such a mechanism would be particularly beneficial to smaller voice providers, which may have somewhat greater sensitivity to such costs. The FNPRM notes that “commenters on the [*Reassigned Numbers*] *NOI* largely agree that service providers should be compensated for the costs of reporting data to a reassigned numbers database, but callers argue that any cost recovery mechanism should be reasonable so that access to the data will be affordable.”⁴⁷ The measures discussed above for minimizing the costs to voice providers should go a long way towards balancing these interests; the lower those reporting costs are, the lower the amount callers collectively would be required to pay in order to compensate voice providers appropriately. As Comcast has noted, the

⁴⁴ The Commission also could consider establishing a procedure whereby a small voice provider could be permitted to report less frequently (e.g., monthly) if it can demonstrate that a daily or weekly reporting obligation would impose substantial burdens.

⁴⁵ FNPRM ¶ 24.

⁴⁶ See Comcast NOI Comments at 16.

⁴⁷ FNPRM ¶ 29.

Commission could look to the FTC’s subscription-based approach for the federal do-not-call list as a potential fee model in this context.⁴⁸

Finally, the FNPRM correctly recognizes the risk that some entities might attempt to use the database for improper purposes—noting, for instance, that “the database information may be business- and market-sensitive, especially as it relates to customer churn,” and could also be “used by fraudulent robocallers or other bad actors for spoofing or other purposes.”⁴⁹ The Commission thus should require that entities accessing the database certify that information will be used for TCPA compliance purposes or for otherwise ensuring that calls or texts reach their intended recipients, and not for other improper commercial purposes.⁵⁰ Moreover, to the extent that an entity relies on a third-party vendor to maintain its calling lists, that vendor should be required to submit its own certification rather than rely on the certification of its underlying customer—so that every party that actually accesses the database is directly and unmistakably subject to the same legal obligations.

B. The Commission Can and Should Adopt a Safe Harbor Under the TCPA To Minimize Unwarranted Liability and Encourage Widespread Use of the Database

Comcast also strongly supports the FNPRM’s proposal to “adopt a safe harbor from TCPA liability for those callers that choose to use a reassigned number database.”⁵¹ As Comcast

⁴⁸ Under that model, callers pay the FTC a flat fee of roughly \$17,000 annually for full access to the database, without paying additional per-dip fees over and above that amount. *See* Federal Trade Commission, “Telemarketer Fees to Access the FTC’s Do Not Call Registry to Rise Slightly in FY 2018,” Aug. 14, 2017, *available at* <https://www.ftc.gov/news-events/press-releases/2017/08/telemarketer-fees-access-ftcs-do-not-call-registry-rise-slightly>.

⁴⁹ FNPRM ¶ 26.

⁵⁰ *See id.* ¶ 27.

⁵¹ *Id.* ¶ 31.

and others explained in comments filed in response to the *Reassigned Numbers NOI*, such a safe harbor would provide various benefits to businesses and consumers alike. Among other things, a safe harbor would ensure that legitimate businesses calling consumers in reliance on information obtained from the database will not face TCPA lawsuits in the rare instances where a particular number reassignment is not captured (e.g., due to an inadvertent reporting error by the underlying voice provider or a delay in uploading or syncing the relevant information).⁵² Moreover, while the Commission has made clear that it is “not proposing to mandate that callers use a reassigned numbers database in order to comply with the TCPA,”⁵³ establishing such a safe harbor would provide a powerful incentive for callers to encourage *voluntary* use of the database.⁵⁴ A wide array of parties filing in response to the *Reassigned Numbers NOI* agree—including not only business commenters representing a wide range of industries,⁵⁵ but also consumer advocacy groups⁵⁶ and governmental entities.⁵⁷

⁵² See Comcast NOI Comments at 13.

⁵³ FNPRM ¶ 30.

⁵⁴ See Comcast NOI Comments at 13.

⁵⁵ See, e.g., Comments of the Internet Association, CG Docket No. 17-59, at 2-3 (filed Aug. 28, 2017); Comments of the Student Loan Servicing Alliance, CG Docket No. 17-59, at 1 (filed Aug. 28, 2017); Comments of NCTA – The Internet & Television Association, CG Docket No. 17-59, at 4 (filed Aug. 28, 2017); Comments of the Credit Union National Association, CG Docket No. 17-59, at 1 (filed Aug. 28, 2017).

⁵⁶ See, e.g., Reply Comments of National Consumer Law Center, Consumer Action, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, Public Citizen, Public Knowledge, and U.S. PIRG, CG Docket No. 17-59, at 5 (filed Sept. 26, 2017) (voicing support for a safe harbor that is “crafted to ensure that callers maintain their compliance requirements with the TCPA”).

⁵⁷ See, e.g., Comments of the District of Columbia Public Schools, CG Docket No. 17-59, at 2 (filed Aug. 28, 2017) (explaining that “[a] database of reassigned numbers, along with a safe harbor provision, would further protect educational institutions and reinforce that the mass notification providers we engage on our behalf are not liable under the TCPA . . . for education-related messages received in error”).

Establishing a safe harbor also would bring substantial benefits to consumers.⁵⁸ In particular, as more callers make use of the database due to the existence of the safe harbor, fewer calls will be mistakenly directed to reassigned telephone numbers, thus substantially reducing the number of unwanted communications that consumers receive. By the same token, widespread use of the database spurred by the safe harbor will ensure that consumers who desire and consent to certain communications from businesses actually receive those desired communications. As noted above, these communications include a wide range of calls and messages that consumers specifically ask to receive and in many cases relay important service-related information.⁵⁹

In determining the precise contours of the safe harbor, one possible approach would be for the Commission to rule that a caller is not liable under the TCPA for a call inadvertently placed to a reassigned telephone number where the caller (1) has previously obtained the necessary consent to call a particular number; and (2) has reasonably determined, based on a query of the Commission's designated database conducted within 31 days before making a call to that number, that the number has not been reassigned since consent was obtained.⁶⁰ Such a safe harbor would be consistent with the approach taken with other similar safe harbors in the Commission's rules. For instance, the Commission's safe harbor from liability for telephone solicitations placed to numbers on the national do-not-call list similarly protects callers that update their calling lists based on queries of the FTC's do-not-call database conducted "no more

⁵⁸ See Comcast NOI Comments at 13-14.

⁵⁹ See *supra* at 8.

⁶⁰ See FNPRM ¶ 31 (asking "under what circumstances . . . callers [should] be permitted to avail themselves of the safe harbor" and "what precisely . . . [the safe harbor would] protect a caller from").

than 31 days prior to the date any call is made.”⁶¹ In adopting this safe harbor, the Commission explained that a caller “that has made a good faith effort to provide consumers with an opportunity to exercise their do-not-call rights should not be liable for violations that result from an error.”⁶² The FTC made the same observation when it adopted an analogous safe harbor under its do-not-call rules.⁶³ The Commission should reach a similar conclusion here, finding that where a caller relies on the comprehensive reassigned number database to ascertain whether it continues to be reasonable to rely on previously obtained consent, the caller is making a good faith effort to comply with the TCPA and should not be subject to potential liability.

The Commission plainly has legal authority to establish such a safe harbor. Section 227(b)(2) grants the Commission the power to “prescribe regulations to implement the requirements” of subsection (b), which includes the core requirements under the TCPA to obtain prior express consent when calling mobile numbers using an automatic telephone dialing system or an artificial or prerecorded voice, and when calling residential telephone lines using an artificial or prerecorded voice.⁶⁴ Moreover, the D.C. Circuit recently recognized that, in implementing the prior express consent requirements of subsection (b), it is reasonable for the Commission to “interpret[] a caller’s ability under the statute to rely on a recipient’s ‘prior

⁶¹ 47 C.F.R. § 64.1200(c)(2)(D).

⁶² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 38 (2003).

⁶³ *See Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4646 (Jan. 29, 2003) (“Sellers or telemarketers who have made a good faith effort to provide consumers or donors with an opportunity to exercise their ‘do-not-call’ rights should not be liable for violations that result from error.”); *see also* 16 C.F.R. § 310.4(b)(3) (codifying FTC safe harbor).

⁶⁴ 47 U.S.C. § 227(b)(2).

express consent’ to ‘mean reasonable reliance.’”⁶⁵ Indeed, the court pointed specifically to the Commission’s pending proposals to “creat[e] a comprehensive repository of information about reassigned wireless numbers,” and to “provide a safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information,” and explained that “[t]hose proposals . . . naturally bear on the reasonableness of calling numbers that have in fact been reassigned, and have greater potential to give full effect to the Commission’s principle of reasonable reliance” grounded in Section 227(b).⁶⁶

The Commission can and should follow the roadmap laid out by the D.C. Circuit for relying on Section 227(b) as authority to adopt the proposed safe harbor. The Commission should begin by reaffirming its judicially validated interpretation of Section 227(b) as including a “reasonable reliance” principle embedded in the requirement to obtain “prior express consent” for calls using an automatic telephone dialing system or a prerecorded or artificial voice.⁶⁷ As the D.C. Circuit noted, the Commission has “consistently adopted a ‘reasonable reliance’ approach when interpreting the TCPA’s approval of calls based on ‘prior express consent’”⁶⁸—not only in the context of reassigned numbers,⁶⁹ but also in other scenarios where the ability to rely on an individual’s consent might otherwise be subject to question.⁷⁰ The adoption of the

⁶⁵ *ACA Int’l*, 885 F.3d at 707.

⁶⁶ *Id.* at 709.

⁶⁷ *Id.*

⁶⁸ *Id.* at 707.

⁶⁹ *See id.* at 705 (citing *2015 TCPA Order* ¶ 90 n.312).

⁷⁰ *Id.* at 707 (noting with approval the Commission’s determination that “a caller can rely on consent given by a wireless number’s ‘customary user’ . . . rather than by the subscriber herself,” based on the Commission’s reaffirmation that “in ‘construing the term prior express consent in [S]ection 227(b)(1)(A), we consider the caller’s reasonableness in relying on consent’” (quoting *2015 TCPA Order* ¶ 75)).

safe harbor would then be a specific implementation of that statutory interpretation—a conclusion that a caller’s use of the Commission-designated database to verify whether a number has been reassigned before calling it makes the caller’s reliance on prior express consent received for that number *per se* “reasonable” for purposes of compliance with the TCPA.

Thus, under this approach, the question whether such a ruling constitutes “a safe harbor from [the Commission’s] own enforcement authority” or “from the private right of action contained in the TCPA” is beside the point.⁷¹ This approach is best characterized as a safe harbor from the *substantive* prohibition on placing calls absent “prior express consent” under Section 227(b)—based on the Commission’s interpretation of that statutory provision as encompassing a “reasonable reliance” principle. Such a safe harbor would be binding not only on the Commission, but also on courts applying that provision of the TCPA in individual cases concerning reassigned numbers. Indeed, courts routinely apply Commission-created safe harbors in actions brought in federal court under the TCPA.⁷² In some cases, courts have even applied Commission-created safe harbors to dispose of claims that pre-date the agency’s adoption of the

⁷¹ FNPRM ¶ 31.

⁷² See, e.g., *Simmons v. Charter Communs., Inc.*, 222 F. Supp. 3d 121, 131 (D. Conn. 2016) (explaining that “the assertion of non-liability based on compliance with the safe harbor provisions” contained in the Commission’s rules and orders implementing the TCPA “may be properly classified as an affirmative defense” in a federal court litigation arising under the TCPA, and explaining that it was unnecessary to reach the applicability of any “statutory safe harbor” under the TCPA where the conduct at issue was “protected by the [Commission’s] regulatory safe harbors”); *United States v. Dish Network LLC*, 256 F. Supp. 3d 810, 837 (C.D. Ill. 2017) (finding that imposition of liability under the TCPA was appropriate based in part on defendant’s failure to show that its calls qualified for an “FCC Rule safe harbor”); *Robinson v. Diversified Consultants, Inc.*, 2017 U.S. Dist. LEXIS 218893, at *7 (C.D. Cal. Nov. 15, 2017) (explaining that the existence of a Commission-created safe harbor “may affect [defendant’s] liability under the TCPA”).

relevant safe harbor.⁷³ The proposed safe harbor thus would provide an effective means of eliminating unwarranted TCPA liability for callers that seek to comply with the statute through reasonable reliance on a Commission-designated database.

II. ANY BROADER REFORMS UNDER THE TCPA IN THE WAKE OF *ACA INTERNATIONAL* CAN BE PURSUED IN PARALLEL WITH THIS PROCEEDING

As the Commission presses forward in considering the specific proposals in this proceeding to establish a reassigned number database—proposals that now have even more merit in the wake of the D.C. Circuit’s ruling in *ACA International*, as discussed above—it is entirely appropriate for the Commission *also* to undertake a broader reexamination of its orders implementing the TCPA in light of the court’s decision.⁷⁴ The Commission can and should advance the two proceedings on parallel paths.

As the Commission is well aware, the *2015 TCPA Order*, adopted under prior Commission leadership, embraced an approach to the TCPA that was deeply flawed in various respects. In addition to the *Order*’s draconian treatment of calls to reassigned numbers noted above, the *Order* adopted unreasonably broad interpretations of key terms in the TCPA—most notably the term “automatic telephone dialing system” (“ATDS”). The TCPA prohibits calls made from an ATDS to wireless telephone numbers absent the prior express consent of the

⁷³ See, e.g., *Reid v. I.C. System, Inc.*, 2017 U.S. Dist. LEXIS 43770, at *3-4 (D. Ariz. Mar. 24, 2017) (finding that denial of class certification was appropriate where the proposed class sought to encompass individuals who received a single call from defendants between 2012 and 2015, and explaining that, in light of the Commission’s adoption of a one-call safe harbor for calls to reassigned numbers in 2015, such individuals had “no legal claims after the FCC’s safe harbor ruling”).

⁷⁴ See *2018 TCPA Reform PN* at 1.

called party,⁷⁵ and defines an ATDS as any device capable of generating, storing, and dialing numbers “using a random or sequential dialing generator.”⁷⁶ The *2015 TCPA Order* adopted an expansive reading of the statute’s definition of ATDS, sweeping in not only dialing systems with the current ability to generate, store, and dial random or sequential numbers, but also systems with the “potential ability” to do so if modified in the future.⁷⁷ The *Order*’s unreasonably and unjustifiably broad view of what is an ATDS significantly expanded the universe of wireless calls potentially subject to the TCPA—thus fueling the abusive TCPA litigation that has spread like wildfire in recent years. The *Order* also muddled the waters with respect to how called parties may revoke their consent to be contacted—by preventing callers from unilaterally specifying “the manner in which revocation may occur” and declaring that “a called party may revoke consent at any time and through any reasonable means.”⁷⁸ This ruling has limited the ability of businesses to establish reliable channels for processing revocations of consent, which in turn has hampered businesses’ efforts to mitigate TCPA liability risks.

The D.C. Circuit’s ruling in *ACA International* provides significant relief from the harmful rulings contained in the *2015 TCPA Order*. In addition to striking down the *Order*’s treatment of calls to reassigned numbers—and pointing to the proposals in this proceeding to establish a database and accompanying safe harbor as a more reasonable approach to addressing such calls⁷⁹—the court struck down the Commission’s “unreasonably expansive” interpretation

⁷⁵ 47 U.S.C. § 227(a)(1), (b)(1)(A)(iii); *2015 TCPA Order* ¶¶ 19, 47, 72.

⁷⁶ 47 U.S.C. § 227(a)(1).

⁷⁷ *2015 TCPA Order* ¶ 19.

⁷⁸ *See id.* ¶ 47.

⁷⁹ *See ACA Int’l*, 885 F.3d at 709.

of the term ATDS.⁸⁰ According to the court, the FCC’s 2015 determination that calling equipment qualifies as an ATDS based on “‘its potential functionalities’ or ‘future possibility,’ not just its ‘present ability,’” was an “unreasonable, and impermissible, interpretation” of the TCPA.⁸¹ The court further held that the *Order* failed to “satisfy the requirement of reasoned decisionmaking” in addressing “which functions qualify a device as an autodialer,” thus “compound[ing] the unreasonableness of the Commission’s expansive understanding of when a device has the ‘capacity’ to perform the necessary functions.”⁸² Separately, on the issue of consent revocation, while the court did not invalidate the *Order*’s ruling, it did construe the *Order* narrowly—specifically finding that the *Order* “does not address revocation rules mutually adopted by contracting parties,” and thus opening the door to further Commission clarification on this issue.⁸³

The Commission’s recently initiated proceeding on these issues presents an important opportunity to revisit these and other matters involving the TCPA. But nothing about the Commission’s consideration of broader TCPA reforms in light of *ACA International* should preclude ongoing efforts in this proceeding to address the specific issue of calls to reassigned numbers—just as nothing about the instant proceeding should prevent the Commission from moving forward with examining broader reforms. Moreover, the Commission should carefully consider alternative ideas for addressing the reassigned number issue in that broader reform

⁸⁰ *Id.* at 692.

⁸¹ *Id.* at 695, 697.

⁸² *Id.* at 703.

⁸³ *Id.* at 710.

proceeding, as the Commission's recent Public Notice appropriately contemplates.⁸⁴ But those efforts should not derail the significant progress made in this proceeding (based on a voluminous and growing record) towards crafting a viable and durable solution based on the establishment of a comprehensive database and a safe harbor for callers relying on the database.

⁸⁴ See *2018 TCPA Reform PN* at 3-4.

CONCLUSION

Comcast continues to support the Commission's proposals to establish a comprehensive, centralized, Commission-designated database of reassigned telephone numbers, and to encourage use of this resource by adopting an appropriately tailored safe harbor from TCPA liability for users of the database. Comcast looks forward to working closely with the Commission on implementing these proposals in a way that maximizes the benefits to consumers and businesses while minimizing costs.

Respectfully submitted,

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